make findings of fact or conclusions of law and no declarations of law nor request to make findings of fact were requested of said courts. As there are no exceptions in this record that are suggested by the assignments of error herein, it is clearly evident that this court must affirm the judgment.

Marshall vs. Burtis, 172 U. S., 630.
Salina Stock Co. vs. Salina Creek Co., 163 U. S., 109.
Cohn vs. Daly, 174 U. S., 539.
Cannon vs. Pratt, 99 U. S., 619.
Thompson vs. Ferry, 180 U. S., 484.
Saltonstal vs. Birtwell, 150 U. S., 417.
Stoner vs. United States, 164 U. S., 380.

In said *Thompson vs. Ferry*, the syllabus of the case is as follows:

"The evidence will be assumed to sustain the judgment and the judgment will be affirmed by the Supreme Court of the United States on appeal from the judgment of a territorial court in the absence of any errors assigned or exceptions to rulings on the admission or rejection of testimony where the supreme court of the territory merely sets forth in its opinion the facts upon which it proceeds but there are no specific findings as such."

In said *Marshall vs. Burtis*, the Supreme Court in its syllabus states the following:

"Act of April 7, 1874, provides that the appellate jurisdiction of the Supreme Court shall be exercised by appeal except in cases of trial by jury. And that on appeal, instead of the evidence at large, the statement of the facts of the case in the nature of a special verdict shall be made by the court below and transmitted with the transcript of the record. Held, that in the absence of the findings of facts the court will assume that the judgment rendered by the territorial court on a trial without a jury was justified by the evidence."

In said *Cohn vs. Daly* the syllabus is as follows:

"Unless a statement of facts in the nature of a special verdict is made and certified by a territorial court where the trial was without a jury as required by 18 Stat. 27-28, the Supreme Court on appeal

must assume that the evidence supports the judgment. A so-called statement which merely embodies the evidence is not such as is contemplated by the statute."

In said *Saltonstal vs. Birtwell*, the second syllabus is as follows:

"Defective findings of fact made by the court where a jury is waived can not be helped out in a reviewing court by reference to the opinion delivered."

In said *Salina Stock Co. vs. Salina Creek Co.*, the syllabus is as follows:

"Where the record on appeal from the Supreme Court of a territory presents no statement of facts showing whether the facts found were sufficient to sustain the judgment rendered and no exceptions were taken to the rulings in the admission or rejection of evidence there is no question for review."

ASSIGNMENT OF ERRORS.

The case was tried by the court and a jury was waived. (R. P. 163). The twelve assignment of errors in this case on pages 3-4 and 5 of the printed record, challenges the attentions of this court to the conclusions of law made by the Oklahoma Supreme Court upon the evidence submitted. There is no error assigned as to the admission or rejection of testimony and as all of said assignments are upon the question of the conclusions of law found by the territorial Supreme Court upon the evidence submitted, under the rulings above quoted, this court should affirm the judgment.

SAME RULE IN COURT OF APPEALS.

Judge Thayer, for the court, in the case of *Walker vs. Miller*, 59 Fed., 869, uses this language on page 870:

"The record contains the pleadings, the special finding and judgment and a bill of exceptions showing the testimony upon which the findings of fact were predicated. But as no exceptions were saved by the bill of exceptions which we are asked to review, it might as well have been omitted from the record—Neither the Supreme Court nor the Court of Appeals, will undertake to determine a case like the one at bar, whether the special findings are supported by the

testimony contained in the bill of exceptions. For to do so would be simply to review the decision of the trial court on questions of fact rather than of law. By filing a written stipulation waiving a jury, the parties to a litigation may impose upon the Circuit Court the duty of making a general or special finding on questions of fact, but they can not impose upon an appellate court a like duty. The findings of the trial court, whether it be general or special, has the same conclusive effect, when the record is removed by the writ of error to an appellate tribunal, as a similar finding by a jury, and exceptions must be saved and presented in the same manner, either by objections to the introduction or to the exclusion of testimony, or by tendering declarations of law and obtaining a ruling thereon. These several propositions are well established by repeated adjudications."

Citing:

Insurance Co. vs. Folson, 18 Wall., 237-249.
Cooper vs. Omohundro, 19 Wall., 65-69.
Norris vs. Jackson, 9 Wall., 125-127.
Schuchardt vs. Allans, 1 Wall., 359.
Kearney vs. Case, 12 Wall., 275.
Burr vs. Navigation Co., 1 Wall., 99.
Lehnen vs. Dickson, 148 U. S., 71.
Martinton vs. Fairbanks, 112 U. S., 670.
Bank vs. Farwell, 56 Fed., 570.

See also,

Rodecker vs. Littauer, 59 Fed., 857.
Bowden vs. Burnham, 59 Fed., 752.

THE PLEADINGS AND FINDINGS.

If this court, however, is inclined to construe the pleadings and findings, it may be well to examine them.

The action was begun April 6, 1901, (Ptd. R. p. 15) and is a suit on contract. The petition alleges the execution of the contract; setting up a copy thereof; the payment of $500.00 as an option; the delivery of the property by Nelson to the plaintiffs in error; the failure of the plaintiffs in error to return the same *and the conversion of the same to their own use.* Also the failure to pay the $4,500.00 as provided in the contract. A copy of the contract is attached to the petition. (Ptd. R. p. 15-16-17).

The amended answer (Ptd. R. p. 22), upon which the case was tried admits that Nelson was in possession of the property; that the same was delivered to the plaintiffs in error, "in consideration of which the defendant paid to plaintiff the sum of $500.00 and agreed on or before March 4, 1901, to pay to plaintiff the further sum of $4,500.00 or in lieu thereof to turn back to plaintiff all the property delivered to him by defendant as aforesaid."

Then the answer pleads that the contract was simply, "a memorandum indicating in a general way the nature of said contract."

That the shares of stock were delivered to defendant at Guthrie National bank, "and defendants aver that prior to the 4th day of March, 1901, they duly notified plaintiff that they did not desire to make payment of the $4,500.00, balance due on said contract, at their option, but on the contrary desired to turn back to plaintiff all of said stock and other property mentioned in the petition, and defendants at said time duly notified plaintiff, that said certificates of stock and other property were at the Guthrie National Bank, in the City of Guthrie, the place where said property was delivered, and where it was to be delivered, and that defendants were ready and willing to deliver and turn back said property to plaintiff; and that the defendants duly tendered all of said property back to plaintiff at said place of delivery prior to March 4, 1901, under and by virtue of the terms of said contract."

Then the answer avers that, as the plaintiff Nelson did not appear to receive the property or send any other person to receive it, they expressed the shares of stock to plaintiff at Fort Smith, Arkansas, his last known post office address. And also wired plaintiff, that they had expressed the stock and also wrote him, "as to what disposition they should make of the books, seals and other property turned over to them by plaintiff." That Nelson refused to receive the stock.

Then the answer avers that the contract was fradulent and they plead a want of consideration. And that, by reason of the

want of consideration, and the fradulent character of the contract, the defendants were damaged in the sum of $10,000, for which they asked judgment.

The reply is in a general and specific denial. (Ptd. R., p. 25). Then it alleges, that the defendants visited Fort Scott, Kansas, where the general offices of the Coal Companies were, long before the contract was made, were thoroughly conversant with all of the records of the company; saw the opinions of attorneys as to the legality of the leases; examined the lands and talked with the president of the company, Colonel Brown, and knew all about the output of the mines. That, after the contract was made, they always treated the property as their own, electing themselves directors and officers of the company and received the income from the property of the Coal Companies. And that after the 4th day of March, 1901, the defendants went to Washington for the purpose of determining whether they should retain said property or return it to the plaintiff. And that they failed after the 4th of March to return said property back to this plaintiff and put him in the position he was, prior to the execution of the contract.

The reply further states, that previous to the execution of the contract, Nelson controlled a majority of the stock; that the board of directors were friendly to him; that he was about to open up more mines, and was seeking to obtain a promise from the Indian agents for leases; that relying upon the contract, time being of the essence thereof, after the 4th of March he sought other employment.

The foregoing is a brief synopsis of the pleadings. The case was tried before the District Court of Logan County, without a jury, and after an exhaustive trial the court found as follows:

(R p 163)

THE FINDING.

"And the court after hearing all the evidence and argument of counsel and being fully advised in the premises, *finds for the plaintiff on all of the issues in this action*, and finds that said defendants,

and each of them, are indebted to said plaintiff on the contract sued upon, and set out in his petition in the sum of $4,500.00, with interest thereon at the rate of 7 per cent per annum, from the 4th day of March, A. D., 1901."

This is the only finding in the case. Now if the court will consider this question we desire to submit the following authorities:

AUTHORITIES.

In *Haskins vs. Dern*, 56 Pac., 953, the Supreme Court of Utah decided a case almost on all fours with the case at bar, the syllabus being:

1. "A contract to return certain shares of stock within a time limited, or pay a fixed amount per share therefor, is not a bailment, and upon a failure to return the stock within the limit, the holder becomes liable for the amount agreed upon.

2. "Where a party, upon good consideration, binds himself to do a certain thing or pay a stipulated sum of money at his option, the contract being in the alternative, the sum named is not a penalty, and upon his failure to do the certain thing, is absolutely bound to pay the stipulated amount.

3. "Where a debtor has the election to pay, either the money or the property within a certain time, and he fails to exercise his option, and make a tender at the time fixed, he losses his election, and the obligee has the right to demand the money."

In *Stephen vs. Hertzler*, 19 So. 838, the Supreme Court of Alabama decide a case very similar. The syllabus of the case is as follows:

"Plaintiff contracted to sell defendant stock of a corporation, for a certain price, within a certain time, at defendant's option. Subsequently, he delivered the stock to the defendant, who executed a writing, acknowledging the receipt of the stock and agreeing to pay therefor according to the terms of the option contract, or return the stock within a certain time. Held, that on failure of defendant to return the stock within the specified time, he was liable for the price."

In this case they cite:

21 *Am. & End. Enc. of Law*, 647.

Foley vs. Felrath, 98 Ala., 176.

Tenn. Transportation Co. vs. Kavanaugh, 93 Ala., 324.

Also *Buswell vs. Bicknell*, 35 Am. Dec., 262.

for appeal was made on the 24th day of October, 1904, and an appeal allowed on that day. (Motion p. 3)

This motion therefore comes too late.

Generes vs. Bonnemer, 7 Wall 564;
Avendano vs. Gay, 8 Wall 376;
Flanders vs. Tweed, 9 Wall 425;
Kearney vs. Case, 12 Wall 275;
Bethel vs. Mathews, 13 Wall 1.

III

We desire to add that the suggested statement of facts in the nature of a special verdict which is incorporated in the motion for certiorari (pages 26 to 36 of Motion) in no way states the facts and is full of errors, and a controversy would arise at once if the Supreme Court of the Territory of Oklahoma was required to prepare such statement. And this controversy emphasizes the words of the court in the case of Generes vs. Bonnemer which are as follows:

"To permit the Judge to make a statement of facts on which the case shall be heard here after the case is removed to this court by the service of the writ of error or even after it is issued, would place the rights of the parties who have judgment of record entirely in the power of the Judge without hearing and without remedy."

So the appellee's motion we think should be sustained.

W. R. BIDDLE,
GEO. S. GREEN,
Attys. for Appellee.

W. P. DILLARD,
Of Counsel.

FILE COPY.

Supreme Court of the United States.

Office Supreme Court U. S.
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Clerk.

OCTOBER TERM, 1905.

U. S. GUSS, J. W. McNEAL, W. H. GRAY and FRANK H. GREER,
Appellants and Plaintiffs in Error,
vs.
J. T. NELSON,
Defendant in Error.

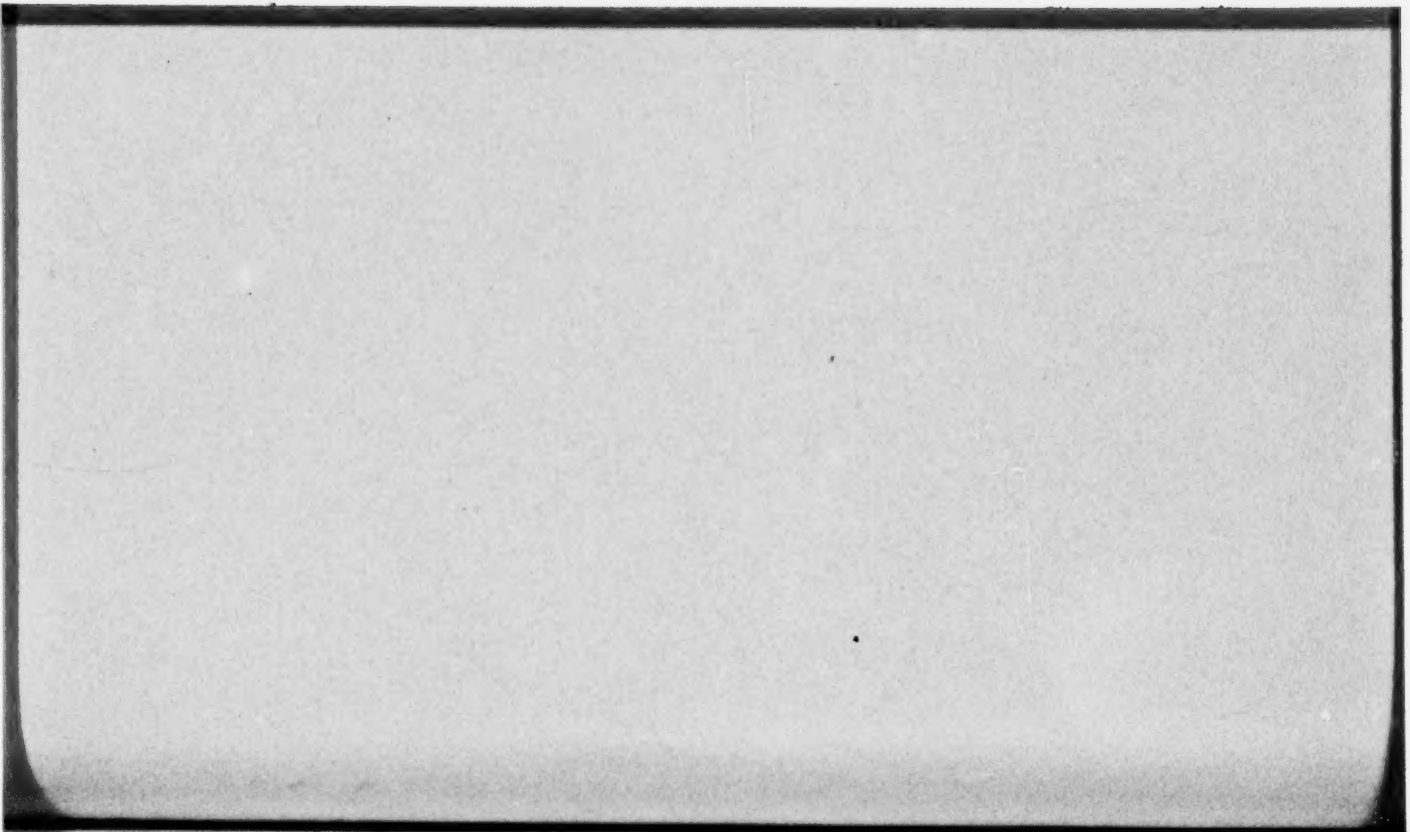
No. 124.

BRIEF OF DEFENDANT IN ERROR.

W. R. BIDDLE,
Attorney for Defendant in Error.

SELWYN DOUGLAS,
GEO. S. GREEN,
H. B. MARTIN,
Of Counsel.

Fort Scott, Kansas, Sept. 30, 1905.



Supreme Court of the United States.

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Appellants and Plaintiffs in Error,
vs.
J. T. NELSON,
Defendant in Error.

No. 124.

BRIEF OF DEFENDANT IN ERROR.

This is an appeal from and writ of error to the Supreme Court of the Territory of Oklahoma. The appeal may be disregarded because the proper method of obtaining a review in the Federal Supreme Court of the final judgment of the Oklahoma Supreme Court under the act of May 2, 1890, is by writ of error and this court has no jurisdiction of the appeal.

Oklahoma City vs. McMaster, 25 Sup. Ct. Rep., 324.
Heicht vs. Boughton, 105 U. S., 235.

NO EXCEPTIONS IN THE RECORD.

The trial court of Logan County, Oklahoma Territory, was not requested and did not make special findings of fact or conclusions of law. The Supreme Court of the Territory of Oklahoma failed to

The Supreme Court uses this language with reference to certiorari.

"This writ is properly used to bring up to the court of error on an allegation by diminution, outbranches of the record or other documents and writing in the court below which have not been previously certified or sent."

U. S. vs. Child, 76 U. S. 661.

And in this case the Supreme Court refused a certiorari for the purpose of requiring the court of claims to complete its record and certify it up.

The Supreme Court has also decided that upon certiorari from Supreme Court upon diminution of the record the return may be made by the Clerk of the Court below and need not be made by the judge.

Stewart vs. Ingle, 22 U. S. 526;
Worchester vs. Georgia, 31 U. S. 515.

We think the appellants are not entitled to this writ and have mistaken their remedy, if they have any at all.

"Certiorari is a writ issued by a superior court to an inferior court of record requiring the latter to certify up to the former some proceedings therein pending or the records of the proceedings in some cause already terminated in cases where proceedure is not according to the course of the common law."

4 Enc. of Pleadings & Practice, p. 8.

"Certiorari is an extraordinary remedy resorted to for supplying defects of justice in cases obviously entitled to redress and and yet unprovided for by the ordinary forms of proceedings. It is also in the nature of that afforded by a writ of error. It is not a proceeding against the tribunal or an individual composing it, it acts upon the cause or proceedings in the lower court and removes it to the superior court for reinvestigation."

4 Enc. of Pleadings & Practice, p. 9.

"The writ is issued to bring up for review the record of the proceedings complained of and is not a citation to appear and justify the action of the tribunal as though a judgment was rendered against its members."

State vs. Dowling, 50 Mo. 134.

"The legitimate office of the writ is to enable the court to review and to correct the decisions and final determinations of inferior officers and tribunals and not to invest the court with the writ to exercise the powers thus conferred by statute on special officers and tribunals."

Delvin vs. Platt, 11 Abb. Pr. 400.

"The only office which the common law writ of certiorari performs is to certify the records of the proceedings from an inferior to a superior tribunal."

Highway Commissioners vs. Carthage 27 Ill. 140;
Petition of Tucker, 27 N. H. 405.

II.

If the appellants were entitled to a statement of facts in the nature of a special verdict by the Supreme Court of the Territory of Oklahoma they should have made an effort to obtain such record before the appeal was taken.

Upon this question we submit that the opinion and decision of the Supreme Court of the Territory of Oklahoma was made September 2, 1904. (Page 4 of Motion.)

The appellants made application to the Supreme Court of Oklahoma for a statement of facts in the nature of a special verdict on the 10th day of November, 1904, (Motion p. 23) more than sixty days after the decision was rendered. The motion shows that the application

Supreme Court of the United States.

No. 124.—October Term, 1905.

U. C. Guss, J. W. McNeal, W. H. Gray and Frank H. Greer, Appellants and Plaintiffs in Error,
vs.
J. T. Nelson.

Appeal from and in error to the Supreme Court of the Territory of Oklahoma.

[January 15, 1906.]

On May 28, 1900, at Guthrie, Oklahoma Territory, the parties to this action entered into the following contract:

"Memorandum of agreement made and entered into this 28th day of May, 1900, to wit, as follows: J. T. Nelson agrees on his part to turn over 25 per cent of the capital stock of the following coal companies located in the Creek Nation, to wit: Sapulpa, Choctaw, Catoosa, Wewoka, Red Fork, Neyaka, Concharty, Tulsa, Car Creek and Broken Arrow Mining Companies, to the following persons: U. C. Guss, W. H. Gray, F. H. Greer and J. W. McNeal. The consideration of the delivery under which the above listed stock and other stock as hereinafter described is as follows: This also includes the delivery of the records belonging to each of said above-named companies, the seals and other records that in any way belong to any of said companies. A payment of $500 is to be made in cash upon delivery of the above-named property, and additional property in the way of stock hereinafter listed. The $500 is to be considered an option on all said property until the 4th day of March, 1901. At that date the above-named parties are to pay to Nelson an additional sum of $4,500.00 (four thousand five hundred dollars), or in lieu thereof to turn back to said Nelson all the property delivered by him. In addition to the above-mentioned 25 per cent of the capital stock aforesaid, which the said J. T. Nelson represents he owns in his own right, he agrees to turn over and deliver enough more stock to make the aggregate sum of stock delivered by him under this contract as follows:"

(Here follows a list of companies and number of shares of stock in each.)

"The $500.00 above mentioned is to be earnest money, to be forfeited in case the balance of payment is not paid. Nelson also agrees to give U. C. Guss his proxy as director in each of the above-named companies until such time as it may be convenient for him to resign and Guss or some one else be elected to fill the vacancy."

On April 6, 1901, Nelson brought suit in the District Court of Logan County, Oklahoma Territory, to recover the additional sum named in the contract, After answer the case was tried by the court without a jury,

and judgment rendered in his favor on February 20, 1903, for $4,500 and interest. This was affirmed by the Supreme Court of the Territory, 14 Okl. 296, and its judgment was brought here both by appeal and writ of error.

Mr. Justice BREWER delivered the opinion of the Court.

The appeal must be dismissed. *Oklahoma City* v. *McMaster*, 196 U. S. 529.

Considering the writ of error, we remark that no rulings were made in respect to the admission or rejection of testimony presenting anything worthy of consideration. No special findings of fact were made by either the District or Supreme Court, the former finding generally the issues in favor of the plaintiff and rendering judgment upon such general finding, and the latter merely discussing the right of recovery upon the pleadings and such general finding.

Plaintiffs in error contend that this is a mere option contract, and that no liability could attach to them except upon an election to purchase the property, which they never made, but, on the contrary, declined to make, and notified the plaintiff thereof by letter. They call attention to the clause providing that "the $500 is to be considered an option," refer to the fact that there is nothing in the contract in terms mentioning "sale" or "purchase." There is always danger in applying a generic term to a contract and then subjecting it to the general rules controlling contracts of that nature, irrespective of its special stipulations. While an option is given by the contract, and the price paid for the option is named, yet it contains other clauses which are equally binding and from which liability arises. Option contracts are not all alike. As said in *Hunt* v. *Wyman*, 100 Mass. 198, 200, quoted approvingly by this court in *Sturm* v. *Boker*, 150 U. S. 312, 329:

"An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return."

In the contract before us, while an option running until the 4th of March, 1901, is given, for which $500 is to be paid, the stipulation for such option is followed by this: "At that date the above-named parties are to pay to Nelson an additional sum of $4,500 (four thousand five hundred dollars), or in lieu thereof to turn back to said Nelson all the property delivered by him." Here is an absolute promise on the part of plaintiffs in error to pay an additional sum of $4,500 at a specified date, or in lieu thereof to turn back the property. They did not return the property. The amount to be paid and the time of payment are expressly named, and that stipulation in the contract is as significant and binding as any other.

It shows that the option given is an option to return, and that if it is not exercised at the time named the sale is complete, and the promise to pay the balance of the purchase price becomes absolute. This construction of the contract is reinforced by the fact that not only was the stock to be delivered to the plaintiffs in error, but also Nelson agreed to give and did give his proxy as director in each of the companies, so that the possession of the stock and all the rights which attached to it passed to the plaintiffs in error, to be exercised by them subject to the right at any time before the 4th of March to return the property. *Haskins* v. *Dern*, Supreme Court of Utah, 19 Utah, 89, is directly in point.

We see no error in the ruling of the Supreme Court of Oklahoma, and its judgment is

Affirmed.

Mr. Justice McKenna took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.

In *Buswell vs. Bicknell,* 17 Me. 344, 35 Am. Dec., 262, the syllabus of the case is as follows:

"Transfer of chattels, by which an option is given to the transferee, either to return or pay for the same by a certain day, is a valid sale and vests the property in the transferee."

See *Crocker vs. Gullifer,* 44 Me., 491.

69 *Am. Dec.,* 118.

McKinney vs. Bradlee, 117 Mass., 322.

In *Foley vs. Felrath,* 13 So. 485, 98 Alabama, 176, the Supreme Court of Alabama use this language in the opinion:

"An option to purchase, if the party to whom the goods were transferred should like, is very different from an option to return the goods, if he should not like them. In the first case, the title will not pass until the transferee determines the option, if seasonably exercised. In the other, the title passes, subject to the right to rescind and return them, which is in effect a right to resell to his vendor."

Quoting, 2 *Benjamin on Sales,* page 796, Sec. 915, Note 30:

Buswell vs. Bicknell, 17 Me., 344.

Hunt vs. Wyman, 100 Mass., 198.

See *Potter vs. Lee,* 53 N. W., 1047 (Mich.).

Henderson vs. Wheaton, 28 N. E., 1100 (Ill.).

Tex. P. Ry. Co. vs. Marlor, 123 U. S., 687.

In *Orvis vs. Waite,* 58 Ill. App., 504, the Court of Appeals of Illinois state the principle in the syllabus as follows:

"Where a person buys stock in an incorporated company with an option to return same to the vendor within a stated time and be paid a fixed sum therefor, an actual return or offer to return the stock is necessary before suing on the contract. Leaving the same at a bank and notifying the vendor is not sufficient."

See *Page vs. Shainwald,* 62 N. E., 356 (N. Y.)

The true rule and the reason for the rule is given in *Stephen vs. Hertzler*, 19 So., 841.

"The delivery and acceptance of the stock, having no other attribute than an election by the defendant to exercise the option, and performance by plaintiff of the agreement, the necessary import of the last agreement is, that defendant did exercise the option. And upon his promise to pay, time was given for payment as shown by the agreement. It is true the promise was to pay or return the stock within the given time. Most obviously the right to return was a mere condition of a sale. It was a condition subsequent, the performance of which would have rescinded defendant's obligation to pay the price. Its performance was subject alone to his election. The plaintiff was powerless to do any act to prevent or effectuate it. It must needs have been performed by the voluntary act of the defendant. Having failed to perform it, the defendant was discharged, and the promise to pay became absolute."

Mr. Wait, in his 5th Volume of Action and Defenses, 551, says, under title of Sale or Return:

"Where the goods are sold and delivered by the vendor, who takes the promises of the vendee to return them within a limited time, or a reasonable time, if none be limited, or pay a sum of money therefor, the property by the delivery vests in the vendee, subject to an option in him to return the goods within the time. If the vendee exercises this option by so returning them, the contract of sale falls to the ground and is defeated, as if it had never existed. If he does not, the sale becomes absolute, and the price of the goods may be recovered in an action for goods sold and delivered."

Citing:

Moss vs. Sweet, 16 Ad. and El. (N. S.), 493.
Jameson vs. Gregory, 4 Metc. (Ky.), 363.
Spickler vs. Marsh, 36 Md., 222.
Schlesinger vs. Stratton, 9 R. I., 578.
Buffum vs. Marry, 3 Mass. (C. C.), 478.
Chamberlain vs. Smith, 44 Penn St., 431.
Hall vs. Etna Mfg. Co., 30 Ia., 215.
Crocker vs. Gullifer, 44 Me., 491.

So that it would appear by abundant authority, that, the pleadings and findings fully support the judgment.

CONCLUSION.

That provision in the contract, that "The $500.00 above mentioned is to be *earnest money* to be forfeited in case the balance of payment is not paid," has reference solely to a condition of things, that would result in case the goods were returned within the time limited.

It in substance means that in any event $500.00 shall belong to Mr. Nelson.

In other words, that it shall be "earnest money." The authorities quoted, fully sustain this position.

Anderson, in his dictionary of law, defines "earnest" to be:

"A thing delivered to a vendor in assurance of the serious purpose to complete the contract of sale."

In the notes to this definition, he says:

"If the purchaser accepts and pays for the goods, the earnest money counts as a part of the price; if not, the amount is forfeited."

Webster defines it as follows:

"Something given by the buyer to the seller, by way of token or pledge, to bind the bargain and prove the sale."

Respectfully Submitted,

W. R. BIDDLE,

Attorney for Defendant in Error.

SELWYN DOUGLAS,

GEO. S. GREEN,

H. B. MARTIN,

Of Counsel.

Fort Scott, Kansas, Sept. 30, 1905.